

PRIVY COUNCIL

Merla Ramanna

Vs.

Chelikani Jagannadha Rao

P.C.A.No.11 of 1939

(Lord Thankerton, Sir George Rankin and Lord Justice Clauson JJ.)

18.03.1941

JUDGMENT

SIR GEORGE RANKIN J.

1. *Dharma Rao and Kasibabu* were brothers, the former being older than the latter by about 19 years. The appellant Merla Ramanna was a creditor of Dharma Rao in respect of a promissory note executed in 1928 for Rs. 10,000 with certain interest. Respondents 1 and 2 (herein called the respondents) are the sons of Kasibabu who died in 1910. The family is governed by the Mitakshara. Respondents 3 and 4 do not appear and need not be mentioned. After Dharma Rao's death in 1929, the appellant sued the respondents in the Court of the Subordinate Judge at Coconada as being persons in possession of Dharma Rao's estate and on 27th January 1931 recovered judgment in the usual form limited to assets of Dharma Rao which had come to their hands. Certain immovables in which Dharma Rao had had an interest were attached before judgment and on 22nd April 1932, the respondents applied to the Subordinate Judge to raise the attachment contending that the properties attached were not liable to be taken in execution under the decree. Their case is that they were coparceners with their uncle in a joint Hindu family governed by the Mitakshara and that on Dharma Rao's death they became entitled by survivorship to the whole interest in the joint family property, the appellant, though a creditor of Dharma Rao, not having taken any steps in his debtor's lifetime to recover his debt.

2. The appellant, on the contrary contends that Dharma Rao and Kasibabu had ceased so far as regards the attached properties to be undivided and had become separate in estate by reason of a deed of sale (Ex. B) dated 22nd March 1900 whereby Kasibabu purported to sell his one-tenth interest therein to his brother Dharma Rao. To this the

first answer of the respondents is that the deed was a sham deed not intended to have any effect upon the rights of the parties and not the expression of any agreement between them. Further, and in the alternative, the respondents contend that even if the deed of sale was intended to be operative and was entered into *animo contrahendi* it did not have the effect of dividing the brothers' interest in the attached properties or of bringing to an end the right of the survivor to succeed to the whole interest. This contention is based upon the circumstance that in 1900 other branches of the family were joint with the branch represented by Dharma Rao and Kasibabu and it is said that the members of these other branches are not shown to have had notice of the deed of sale. As their Lordships do not find it necessary to examine this contention it need not be stated more particularly. The respondents also contend that if Dharma Rao had acquired Kasibabu's one-tenth interest in addition to his own he had brought the income into the common stock so as to make the properties joint. This contention was raised by the respondents in their petition and though it does not seem to have been urged at the hearing before the Subordinate Judge, it was maintained before the High Court with success.

3. Apart from Ex. B, their Lordships are satisfied that there is no ground for maintaining that Dharma Rao and Kasibabu's sons had become divided in respect of the properties now in question. The learned Subordinate Judge found that the respondents had " failed to prove that Ex. B is a sham or a nominal document" but the High Court on appeal thought that "the conclusion is irresistible that Ex. B, the sale deed, was a nominal conveyance. " The learned Subordinate Judge found in favour of the appellant that Ex. B operated to divide the interests of the two brothers and by his order of 10th September 1934 he maintained the attachment. The High Court having found that Ex. B was not intended to be acted on held that it did not operate a division of status as between the brothers. They also held that this would not have resulted from the deed even if it had been a real and not a sham transaction; and that if a division of interest had taken place by virtue of the deed the manner in which the income had been treated by Dharma Rao restored the properties comprised therein to the condition of joint family property. The High Court by order dated 16th November 1936 accordingly held that the appellant was not entitled to have recourse to the attached properties in execution of his decree, and this is the decision now complained of.

4. There is a good deal of evidence upon the question whether the deed of sale (Ex. B) was intended by the parties thereto as an agreement between them or was executed

merely to bring into existence a document which might, contrary to the truth, appear to have taken away from Kasibabu his interest in the properties comprised therein. Upon a full consideration of this evidence their Lordships are of opinion that the view taken by Mockett and Lakshmana Rao JJ. in the High Court has the greater reason and should prevail. In 1900 Kasibabu had just attained the age of 18 years and Dharma Rao was 37. of a total alleged consideration of Rs. 12,500 only Rs. 650 is said to have been paid in cash to Kasibabu at the time the rest being accounted for in the deed by recitals about debts of the joint family of the parties' own branch of the family and of Kasibabu personally, and by a statement that Rs. 1000 had been paid as earnest money. Though accounts kept by Dharma Rao over many years are in evidence there is no satisfactory proof of the existence of the alleged debts of their father and none at all that these were in 1900 pressing or that payments were made by Dharma Rao in discharge of them. It is reasonably clear from these accounts that they draw no distinction between properties sold to Dharma Rao by Ex. B and other properties in which Kasibabu retained his original interest as a coparcener. He and his family are shown to have been provided for out of the income of the family as a whole down to 1908 when the four branches became divided in status, and thereafter out of the income of the branch. It is not easy to account for such a transaction as the deed discloses, save upon the ground that Kasibabu was thought to be foolish and extravagant and given to bad habits, likely to lead to his dissipating his property. There is direct evidence contradicting one of the recitals as to his having taken a loan during his minority, and there is evidence of statements made by Dharma Rao disclaiming that by the deed he had become entitled to his brother's share. In 1912 at the making of the record of rights no such effect appears to have been given to the deed.

5. There was another deed in 1910 whereby Kasibabu purported to divest himself of other properties in favour of a nominee for Dharma Rao, and there is also to be considered the fact that Dharma Rao in 1927 made an ineffective, because unwitnessed, will purporting to leave all his properties to the respondents. In the present case, the oral evidence as to which the Courts in India have differed must be judged mainly upon the probabilities arising out of the proved documents and the admitted facts. Their Lordships think it sufficient to say that the careful and detailed examination of the evidence given by Lakshmana Rao J. in his judgment appears to them to be convincing and that they agree with the High Court in regarding the deed of sale as being merely "nominal" in the sense that it was not intended to have effect upon the right of the parties inter se.

6. Even so, and upon the footing that Ex. B is only a sham, and not a real transaction, the appellant has contended before the Board that it would in law divide the interest of the parties thereto so as to put an end to the jus accrescendi or right of survivorship between coparceners. The learned Judges of the High Court do not appear to have contemplated that a document which was not the expression of an agreement at all and not intended to have effect upon the rights of the parties could have the important effect of changing their undivided status. The repeated references in Ex. B to the one-tenth share of each of the two brothers have been emphasised in argument for the appellant but, while they do not seek in any way to qualify what was said in *Appovier v. Ramasubba Aiyar* their Lordships are unable to hold that coparceners who intend to remain joint and undivided become divided contrary to their intention because for purposes of pretence they refer to their interests as represented by a fractional share. Where a third party has been induced to act upon the footing of such a document as Ex. B, very different questions may arise by reason of estoppel or otherwise, but the question in the present case is limited to the parties themselves and to the immediate effect of the deed. Even a member of a Mitakshara family may sometimes be forgiven for speaking of his "one-third share" instead of using the more accurate but more elaborate expression "the share which if a partition were to take place to-day would be one third." But, in the present case, the reference to the shares as "one-tenth" share is part of the pretence of sale. When once the conclusion is reached that Ex. B is not the expression of any intention or agreement to transfer Kasibabu's interest to Dharma Rao, propriety or impropriety of language matters little since the deed does not warrant any inference of a previous or independent agreement to hold in divided shares. Their Lordships are of opinion that it is not shown as regards the properties now in question that Dharma Rao had before his death ceased to be joint with Kasibabu's sons. They will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs to respondents 1 and 2.

Appeal dismissed.

Cases Referred.

11 MIA 75 : 8 WR 1 : 1 Suther 657 : 2 Sar 218 (PC),